120-600

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1151.

THE CITY OF EAST ST. LOUIS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES EX REL: H. AMY AND COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 14, 1886.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of America for the southern district of Illinois, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court of the United States for the southern district of Illinois, before you, between the United States, *ex rel.* H. Amy & Co., plaintiffs, and The City of East St. Louis, defendant, a manifest error hath happened, to the great damage of the said defendant, The City of East St. Louis, as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second
2 Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this thirtieth day of September, in the year of our Lord one thousand eight hundred and eighty-six, and of our Independence the one hundred and eleventh year.

[The Seal of the Circuit Court of the United States, South. Dist. Ill.]

J. A. JONES, *Clerk.*

3 Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield, in said district, on Saturday, the seventh day of August, in the June term of said court, in the year of our Lord one thousand eight hundred and eighty-six, and of our Independence the one hundred and eleventh year, before the Hon. Samuel H. Treat, district judge of said district and, in the absence of the Hon. Walter Q. Gresham, judge of the seventh judicial circuit, *pro tempore* sole judge of said circuit court.

J. A. JONES, *Clerk.*

UNITED STATES, *ex rel.* H. Amy & Co.,
v.
CITY OF EAST ST. LOUIS. } Mandamus.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that heretofore, to wit, on the fourth day of March, in the year of our Lord one thousand eight hundred and eighty-six, came H. Amy & Co., the relators herein, by Messrs.
4 Connolly and Mather, their attorneys, and filed in the clerk's office of said court their petition herein, which said petition is in the words and figures following, to wit:

Petition.

In the Circuit Court. January Term, A. D. 1886.

UNITED STATES OF AMERICA, *Southern District of Illinois,* } ss:

To the honorable the circuit judges holding said circuit court:

Your petitioners, the United States of America, by Henry Amy and Gustave L. Hoppenstedt, partners, doing business under the firm name and style of "H. Amy and Co.," citizens of the State of New York, the relators, respectfully represent unto your honors that they did, on the 22nd day of August, 1885, recover a judgment at law against the city of East St. Louis, Illinois, in this hon. court for the sum of thirty-six thousand four hundred ninety-five $\frac{28}{100}$ dollars ($36,495.28), which said judgments *are* still in full force and effect, not appealed from, nor in any part paid; that said judgment was recovered upon one bond and certain interest coupons belonging to certain other bonds of the city of East St. Louis, Illinois, as follows:

5 Bond No. 269 of said city for the sum of $500.00, dated February 18th, 1874, and due ten years after the date thereof, and one interest coupon thereunto belonging, for the sum of $50.00, and due February 18th, 1879, both the bond and its said coupon issued by said city pursuant to and under an act of the General Assembly of the State of Illinois, entitled "An act to reduce the charter of the city of East St. Louis, and the several acts amendatory thereof, into one act, and to revise the same," approved March 26th, 1869, and also in pursuance of an act of the city council of said city entitled "An ordinance to fund the floating debt of the city of East St. Louis," approved June 6th, 1872, and number 192.

Which said bond and interest coupon, together with a certified copy of said city ordinance, are all now of file, with the papers in the original suit, general No. 6957, wherein said judgment was recovered, and all of which now remain *now* of file in the clerk's office of this court, and to which reference is hereby expressly made as part of this petition.

Said judgment was also partly recovered *partly* upon interest coupons of bonds of said city, numbered 331 to 333, both inclu-
6 sive, due from June 26th, 1879, to June 26th, 1884, both dates inclusive, for $50.00 each, and which said coupons and bonds numbers 331 to 333, both inclusive, to which said coupons belong, and for $500.00 each, and due June 26th, 1885, were likewise issued by said city under and in pursuance of said charter and said city ordinance No. 192.

Said judgment was recovered partly also upon interest coupons numbers 502 to 503 and 519 to 537, both numbers of each inclusive, due from March 31st, 1879, to March 31st, 1884, both dates inclusive, and for $50.00 each, which said coupons belong to bonds of said city of same numbers as said coupons for $500.00 each, and due March 31st, 1886, and which said bonds and coupons last above numbered were issued by said city pursuant to authority cited and re-

ferred to on the face and back of said bonds, including ordinance of said city No. 286, as will be seen by reference to Exhibits "C 1" attached to the stipulation of facts now on file with the papers of the original suit, and to which reference is hereby made for greater certainty, and as part of this petition for the purposes of the final hearing hereof.

Said judgment was recovered partly, also, upon other interest coupons of said city, Nos. 51 to 100, both inclusive; number
7 111, and numbers 113 to 130, both inclusive, all for $25.00 each, due semi-annually, January and July 1st, 1879, to July 1st, 1884, first and last dates both inclusive, belonging to bonds of said city of corresponding numbers for $500.00 each, due July 1st, 1886.

Said bonds *being* issued under said city charter and pursuant to the authority of an ordinance, No. 300, [of] the city council of said city, endorsed on the back of said bonds, all of which, together with the form of said bonds and the recitals thereof, will more fully and at large appear by reference to an agreed copy of said bonds, together with their endorsements, now of file with the papers of said original suit, wherein said judgments was recovered, attached to the stipulation of facts therein filed, marked Exhibit "D 1," to which also express reference is hereby made and asked to be taken as part of this petition upon final hearing hereof.

Petitioner alleges and further shows unto your honors that since the rendition of said judgment said city and its common council have neglected and refused to pay the same or any part thereof, notwithstanding demands made upon them therefor.

8 Further alleges that said city and its common council and its proper authorities neglect and refuse to levy, collect, and apply the three-mill tax provided for in section 22 of article 7 of said city charter toward the payment of that portion of relators' said judgments so recovered as aforesaid upon bond number 269 and the coupon thereof, as also coupons in said judgment upon bonds Nos. 331 to 333, both inclusive, notwithstanding said tax, if levied, collected, and applied toward the payment thereof, as it ought to be, would be largely more than sufficient to pay that portion of relators' said judgment composed of said bonds, coupons, and interest.

Further avers and shows unto your honors that said city, its common council, and other proper officials have always neglected and refused, and do now neglect and refuse, to levy and collect, with and as a part of the direct tax authorized annually to be collected from the taxable property within the jurisdiction of said city, sums sufficient to pay the interest, coupons, and said judgment belonging to said bonds Nos. 502, 503, and 519 to 597, inclusive, and especially neglected and refused to levy in the annual tax levy for 1885 the sum of $27,500.00, or so much thereof as necessary to pay principal and inter-
9 est of relators' said last-numbered bonds, maturing in 1886, as aforesaid, in accordance with said city ordinance No. 286, printed upon the back of said numbered bonds, as shown by said Exhibit "C 1" in said stipulation of facts filed in the papers of said

original suit, and which ordinance your petitioner avers appropriates sufficient sums from said direct tax to fully pay the same.

Petitioner further avers that said city, its common council, and proper officials have always neglected and refused, and still do neglect and refuse, to levy and collect the amounts of direct tax authorized and appropriated by said city ordinances No. 300, printed upon the back of relators' said bonds, Nos. 51 to 100, 111, 113 to 130, and which, if levied and collected, would be more than sufficient to pay that portion of relators' said judgment composed of said last-numbered bonds and their coupons as aforesaid.

CONNOLLY AND MATHER,
Att'y- for Pl't'ff.

(Indorsed:) Filed March 4, 1886. J. A. Jones, clerk.

10 Afterwards, to wit, on said fourth day of March, of the year aforesaid, a summons was issued in said entitled cause out of the clerk's office of said court, directed and delivered to the marshal of said district to execute, which said summons, together with the return of the marshal thereon, is in the words and figures following, to wit:

Summons.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Circuit Court of the United States of America.

The United States of America to the marshal of the southern district of Illinois, Greeting:

We command you to summon The City of East St. Louis, if found in your district, to be and appear before our judges of our circuit court of the United States for the southern district of Illinois on the ninth day of March, of this term thereof, to be held at Springfield, in the district aforesaid, on Tuesday, March 9th, to answer unto the United States *ex rel.* H. Amy & Co. *et al.*, of a plea of mandamus; and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Springfield aforesaid, this fourth day of March, in the year of our Lord one thousand eight hundred and eighty-six, and of our Independence the one hundred and tenth year.

[L. S.] J. A. JONES, *Clerk.*

11 I have executed the within writ by reading the same, and also delivered a true copy thereof to Morris Joyce, mayor of East St. Louis, Illinois, on the 5th day of March, A. D. 1886.

HERM. G. WEBER,
U. S. Marshal,
By JOHN SCHNEIDER,
Deputy.

(Indorsed:) Filed March 9, A. D. 1886. J. A. Jones, clerk.

And afterwards, to wit, on the tenth day of March, in the January term of said court, of the year aforesaid, the following proceedings were had in said court in said cause and entered of record, to wit:

Judgment Entered March 10, 1886.

UNITED STATES, *ex rel.* Henry Amy and Gustave L. Hoppenstedt, Partners, Doing Business Under Name of H. Amy & Co., *vs.* CITY OF EAST ST. LOUIS.	Mandamus.

And now again come petitioners herein, by Connolly and Mather, attorneys, and it appearing to the court that the defendant has been duly served with process herein, as required by law, and the
12 defendant having failed to plead, answer, or demur to the petition herein filed upon the return day of said process, as required by law, but having made default therein, it is now herein ordered and adjudged by the court that the default of defendant be entered herein; and it is further ordered and adjudged that petitioners have a peremptory mandamus writ as prayed for in said petition, and that the clerk of this court issue such writ, under the seal of this court, directed to the mayor and aldermen of said city, composing its common council, and their successors in office, commanding them at or before the second Tuesday in August, 1886, to convene as a common council for said city of East St. Louis, and levy and certify in the manner required by the laws of the State of Illinois a three-mill tax on all the taxable property of the city of East St. Louis, Illinois, as provided by section 22 of article 6 of the charter of said city and additional to the one-per-cent. tax provided for by section one, article three, of said city charter, and cause the same to be collected with said city's other taxes for the year 1886, and when collected to be set apart and exclusively appropriated toward and used for the payment of relators' said judgment and interest, so far as the same when collected will pay the same, and to pay the same over to the attorney of record of the said plain-
13 tiff, and further commanding said mayor and aldermen composing said city council and their successors in office to levy a further tax in the matter of a special tax on all the taxable property of said city for the year 1886, and on or before the said second Tuesday in August thereof to certify the same to the proper county clerk, as required by law, sufficient in amount to pay that part of relators' said judgment and interest thereon remaining after the application of said three-mill tax thereto, and also sufficient in amount to pay relators' said bonds Nos. 502, 503, and 519 to 537, inclusive, due March 31st, 1886, together with ten per cent. interest thereon due with said bonds, then aggregating, face value, the sum of eleven thousand five hundred [and] fifty dollars ($11,550.00), together with lawful interest thereon till paid, as provided by said city ordinance No. 286 and article 9, section 12, of the constitution of Illinois; also sufficient in amount to pay relators' said bonds Nos. 51 to 100, 111,

113 to 130, inclusive, falling due July 1st, 1886, together with ten per cent. interest thereon due on said last-mentioned date, then aggregating the face sum of thirty-seven thousand nine hundred dollars ($37,900.00), with lawful interest thereon till paid, as provided by said city ordinance No. 300 and said Article 9, section 12, of said constitution, and requiring said mayor and city council and their successors in office to see that said special tax is col-
14 lected with said city's other taxes for 1886, and when collected to be set apart and appropriated exclusively toward the payment of said judgments and bonds and coupons and interest aforesaid, and to pay the same over to the attorney of record for the plaintiff. It is further ordered by the court that said city council or its successors in office make return to this court on or before the — day of ——, 188–, how it shall have performed the commands of said writ.

Then afterwards, to wit, on the twenty-fifth day of March, in the January term of said court, in the year aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

Order Setting Aside Default with Leave to File Answer.

UNITED STATES, *ex rel.* H. Amy & Co.
v.
CITY OF EAST ST. LOUIS. } Mandamus.

This day comes the defendant, by C. W. Thomas, Esq., its attorney, and enters its motion to set aside the default herein entered, which motion is sustained with leave to defendant to file answer, which is done.

15 *Answer.*

UNITED STATES OF AMERICA, *Southern District of Illinois:*

THE UNITED STATES, *ex rel.* H. Amy and Co.
vs.
THE CITY OF EAST ST. LOUIS. } Mandamus.

And now comes the said defendant, by Charles W. Thomas, its attorney, and for answer unto the petition herein says that it admits the recovery of a judgment for $36,495.28 in favor of relators and against the defendant, as set forth in said petition, and admits all the allegations of fact in the said petition to be true except the charge that the common council of the defendant has at any time neglected or failed to levy and collect the three-mill tax provided for by section 22 of article seven of defendant's charter, this defendant averring that it has at no time failed to perform its legal duty in this regard, and, having fully answered, defendant prays to be hence dismissed with its costs in this behalf expended.

CHARLES W. THOMAS,
Def't's Att'y.

[Indorsed:] Filed March 25, 1886. J. A. Jones, clerk.

16 Afterwards, on the twenty-fifth day of June, in the June term of said court, in the year aforesaid, the following further proceedings were had in said court and entered of record, to wit:

Leave to Amend Petition & Rule to Answer Amendment.

UNITED STATES, *ex rel.* H. Amy & Co.
v.
CITY OF EAST ST. LOUIS. } Mandamus.

And now, on this 25th day of June, 1886, comes the relator by his counsel, and by leave of the court amends his petition herein; and it is ordered by the court that the clerk transmit a certified copy of said amendment and of this order to the counsel of the defendant, and that said defendant make answer to said amendment within twenty days from this date.

Then afterwards, on said twenty-fifth day of June, in the year aforesaid, came again said relators by their attorneys, and filed in the clerk's office of said court their amended petition herein, which said amended petition is in the words and figures following, to wit:

17 *Amended Petition.*

UNITED STATES, *ex rel.* H. Amy and Co.
vs.
CITY OF EAST ST. LOUIS. } Mandamus.

Said defendant and its common council claim that under the charter of said city, entitled "An act to reduce the charter of East St. Louis, and the several acts amendatory thereto, into one act and revise the same," passed March 26, 1869, the said common council is prohibited from levying a tax exceeding one per cent. on all the taxable property, real and personal, within said city, and that by levying such one-per-cent. tax it is not able to pay its necessary current expenses and also pay said judgment. But relators show that all said bonds and coupons included in said judgment were issued by said city since the adoption of the present constitution of the State of Illinois, the said city thereby creating an indebtedness, and that by virtue of the provisions of section 12 of article 9 of said constitution it is the duty of said city and its council to levy tax sufficient to pay so much of said judgment as is rendered upon said interest coupons as aforesaid, and also by virtue thereof, and of said ordinances number 286 and 300, to levy tax sufficient to pay
18 the residue of said judgment rendered upon said bonds as aforesaid.

Wherefore petitioner asks the aid of this honorable court in the premises, and to that end makes said City of East St. Louis defendant hereto, and asks for the usual process, rule to answer, &c., and upon final hearing hereof prays for a peremptory mandamus writ herein directed to said city, its mayor and common council, commanding them at the next proper meeting of said city council to levy and certify as required by law upon the real and personal

property subject to taxation within said city for the year 1866 a special tax sufficient to pay relators' said judgment, and further commanding said city, its mayor, clerk, council, collector, and treasurer, to see that said tax so levied shall be collected, and set apart when collected, and exclusively applied to the payment of relators' said judgment.

And petitioner prays for such other and further relief in the premises as may be in accordance with law, and as in duty bound will ever pray, &c.

CONNOLLY AND MATHER,
Attorneys for Relator-.

(Indorsed:) Filed June 25, 1886. J. A. Jones, clerk.

19 Afterwards, to wit, on the sixth day of July, in the year aforesaid, came again said defendant, by its attorney, and filed in the clerk's office of said court its demurrer and answer to amended petition, which said demurrer and answer and also replication of relator to said answer to amended petition are in the words and figures following to wit:

Demurrer to Amended Petition.

UNITED STATES OF AMERICA, *Southern District of Illinois:*

In the Circuit Court of the United States. June Term, A. D. 1886.

THE UNITED STATES OF AMERICA, *ex rel.* Henry Amy and Gustave S. Hoppenstedt, Partners, &c., Under the Name and Style of H. Amy and Co.,
vs.
THE CITY OF EAST ST. LOUIS. } Mandamus.

And now comes the said defendant, and as to all of the amended petition of the said petitioners filed in this cause on the 25th day of June, A. D. 1886, except that part hereinafter specifically answered and denied, demurs and says that the same is not
20 sufficient in law to be answered unto; wherefore the defendant prays the judgment of the court here, &c.

Answer to Amended Petition.

And as to that part of the petitioner's said amended petition wherein it is alleged that the said defendant and its common council neglect and refuse to levy, collect, and apply the three-mill tax provided for in section 22, article 7, of the charter of defendant toward the payment of that part of relators' judgment recovered upon bond 269, and the coupon thereof, as also coupons in said judgment upon bonds Nos. 331 to 333, both inclusive, this defendant denies the said allegation, and says that its proper officers have never since the rendition of said judgment refused or neglected to levy said three-mill tax, nor to hold the same subject to the orders of the various creditors of defendant in proportion to their respective demands upon

the same. And this defendant says that the due and proper share of money raised from said three-mill tax due to relators as creditors of defendant has never been demanded by them or withheld from them.

And now, having fully answered said amended petition, defendant asks to be hence dismissed, &c.

THE CITY OF EAST ST. LOUIS.

CHARLES W. THOMAS,
Def't's Att'y.

(Indorsed:) Filed July 6th, 1886. J. A. Jones, clerk.

21 *Replication to Answer to Amended Petition.*

Replication of petitioner to foregoing answer.

This repliant, saving and reserving unto itself all advantage of exception to the insufficiencies of said answer, for replication thereunto saith that it will aver and prove its said amended petition to be true, certain, and sufficient in law to be answered unto, and that the said answer of said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by its said amended petition it hath already prayed.

CONNOLLY AND MATHER,
Att'ys for Petitioner.

(Indorsed:) Filed July 6th, 1886. J. A. Jones, clerk.

And afterwards, to wit, on said sixth day of July, of the year aforesaid, came again the relators, by their attorneys, and filed in the clerk's office of said court their joinder to the foregoing demurrer, which said joinder is as follows, to wit:

22 *Joinder in Demurrer to Amended Petition.*

UNITED STATES OF AMERICA, *Southern District of Illinois:*

In Circuit Court. To June Term, A. D. 1886. In Mandamus.

THE UNITED STATES, *ex rel.* H. Amy & Co. *vs.* EAST ST. LOUIS.

And now comes the relator, by Connolly and Mather, his attorneys, and, as to the demurrer filed herein by said defendant July 6th, 1886, says that, as to the said parts of said petition therein de-

murred to by said defendant, the same is sufficient in law to be answered unto, and of this prays judgment, as doth said defendant.

CONNOLLY & MATHER,
Att'ys for Relator.

(Indorsed:) Filed July 6, 1886. J. A. Jones, clerk.

Then afterwards, to wit, on the seventh day of August, in the June term of said court, of the year aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

23 *Judgment.*

UNITED STATES OF AMERICA, *ex rel.* H. Amy and Co.
vs. } Mandamus.
THE CITY OF EAST ST. LOUIS.

And now again come the parties herein, by their respective attorneys, and it appearing to the court that the defendant has been duly served with process, as required by law, and said cause coming on to be heard before the court on petition, joint answer, and demurrer filed by defendant, and joined in demurrer and replication to answer proofs, exhibits, &c., and the court having heard the arguments of counsel, and being now fully advised in the premises, doth find that, as to the matter in issue by said answer, *that* said city has annually delivered said three-mill tax to apply upon the bonded debt of said city, and therefore makes no order here regarding the same.

But, as to the demurrer interposed to the other allegations of said amended petition, and especially to the averments that said bonds and coupons in judgment were issued by said city under its said charter since the adoption of the constitution of Illinois of 1870 and were the creation of a debt by said city, and that the provisions of section 12, article 9, thereof made it the duty of said city when creating said debt to provide for the collection of a direct annual tax
24 sufficient to pay the interest on such debt as it fell due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same, and alleging that said city had provided for said debt in the passage of said city ordinances Nos. 286 and 300, authorizing a tax sufficient to pay said bonds and coupons now in said judgment when and as they should become due, and praying for a peremptory mandamus writ commanding the mayor and council of said city, at its next proper meeting, to levy and certify, as required by law and authorized by said constitutional provision and said ordinances, upon the real and personal property subject to taxation within said city, for the year 1886, a special tax sufficient to pay relators' said judgment, the court overrules the same, and defendants' counsel not caring to answer further, but to stand by his said demur-er, it is thereupon ordered and adjudged by the court that the mayor and aldermen, composing the city council of said city of East St. Louis, do convene as a city

council of said city on or before the second Tuesday of August, 1886, and levy a special tax upon all the taxable property of said city subject to taxation for the year 1886, sufficient in amount to fully pay relators' said judgment, viz., thirty-six thousand
25 four hundred ninety-five $\frac{28}{100}$ dollars, with six per centum per annum interest from August 22nd, 1885, date of recovery of said *of said* judgment, till paid, and cause the same forthwith to be certified to the proper county clerk, to be by him extended with said city's other taxes for the year 1886 upon the proper collector's books, and that said council do cause said special tax to be collected for said year with said city's other taxes, and when collected to be kept separate and apart and paid over to said relators' attorneys of record.

And it is hereby further ordered that said city council or its successor provide for the costs of said original suit wherein said judgment was recovered and the costs of this proceeding, amounting together to the sum of $—.

And it is hereby further ordered that said city council or its successor in office show and make return to the court here, on or before the first Monday in October, 1886, how and in what manner they shall have obeyed this order.

And it is further hereby ordered that the clerk of this court issue under the seal of the court a peremptory mandamus writ herein, commanding, &c., as above herein provided, directed to the marshal of said dist[illegible], to execute.

26 Now, afterwards, to wit, on the tenth day of August, in the June term of said court, in the year aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

Order Allowing Writ of Error.

UNITED STATES, *ex rel.* H. Amy & Co.
vs.
CITY OF EAST ST. LOUIS. } Mandamus.

And now on this tenth day of August, 1886, come again the parties, by their counsel, and the defendant prays a writ of error to the Supreme Court of the United States to operate as a supersedeas, which is allowed on its entering into bond to the relator in the penalty of five hundred dollars conditioned as the law directs, with security to be approved by the court within twenty days from date.

Then, afterwards, to wit, on the thirty-first day of August, of the year aforesaid, came again said defendant, by its attorney, and filed in the clerk's office of said court its bond in error herein, which said bond is in the words and figures following, to wit:

27 *Bond.*

Know all men by these presents that The City of East St. Louis, a municipal corporation of the State of Illinois, as principal, and — as sureties, are held and firmly bound unto The United States of

America upon the relation of Henry Amy and Gustave S. Hoppenstedt, partners by the firm name and style of H. Amy and Co., in the penal sum of five hundred dollars, for the payment of which, well and truly to be made, we bind ourselves, jointly, severally, and firmly, by these presents.

Sealed with our seal this twelfth day of August, A. D. 1886.

The condition of this obligation is such, however, that whereas the said United States of America upon the relation of said H. Amy and Co., in a certain proceeding of mandamus then pending in the circuit court of the United States for the southern district of Illinois, wherein the said United States upon the relation aforesaid was plaintiff and the said City of East St. Louis was defendant, did, on the 7th day of August, A. D. 1886, by the judgment and consideration of said court, obtain an order in said cause whereby said city was commanded to make a special tax levy upon all the taxable property within its corporate limits to pay a certain judgment of $36,495.28 recovered by said H. Amy and Co. against said city in said court on the 22nd day of August, A. D. 1885, together
28 with interest on the same and costs of collection, from which order the said City of East St. Louis has prayed and obtained a writ of error from the Supreme Court of the United States:

Now, if the said City of East St. Louis shall prosecute its said writ of error with effect and answer all damages and costs if it fails to make its plea good, then this obligation shall be void; otherwise to remain in full force and effect.

[Seal City of East St. Louis.]

THE CITY OF EAST ST. LOUIS,
By MAURICE JOYCE, *Its Mayor*. [SEAL.]
T. A. CANTY. [SEAL.]
WILLIAM SHEA. [SEAL.]
GARRETT STACK. [SEAL.]
ROBERT CUNNINGHAM. [SEAL.]
C. A. HAINES. [SEAL.]

(Indorsed:) Filed August 31, 1886. J. A. Jones, clerk.

29 UNITED STATES OF AMERICA, }
Southern District of Illinois, } *ss*:

I, J. A. Jones, clerk of the circuit court of the United States in and for the southern district of Illinois, do hereby certify that the foregoing is a true and complete copy of all the papers filed and proceedings thereon had in a certain case wherein The United States, *ex rel.* H. Amy & Co., are plaintiffs and The City of East St. Louis is defendant, as the same appear of file and record in my said office.

In witness whereof I have hereunto set my hand and seal of said court, at Springfield, in said district, this second day of October, in the year of our Lord one thousand eight hundred and eighty-six, and of our Independence the one hundred and eleventh year.

[The Seal of the Circuit Court of the United States for the South'n Dist. Ill.]

J. A. JONES, *Clerk*.

30 THE UNITED STATES OF AMERICA, *ss:*

Supreme Court of United States.

To the United States, *ex rel.* H. Amy & Co., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, 1886, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Illinois, wherein The City of East St. Louis (in the State of Illinois) is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties aforesaid in that behalf.

Witness the Hon. S. H. Treat, district judge of the United States for the southern district of Illinois, at Springfield, in said district, this second day of October, in the year of our Lord eighteen hundred and eighty-six, and of our Independence the one hundred & eleventh year.

S. H. TREAT,
District Judge.

We hereby accept service of the foregoing citation this 2nd October, 1886.

CONNOLLY & MATHER,
Att'ys for Amy & Co.

Endorsed on cover: S. Illinois C. C. U. S. No. 1151. The City of East St. Louis, plaintiff in error, *vs.* The United States *ex rel.* H. Amy & Co. Filed October 14, 1886.

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No. 1151.

THE SUPREME COURT OF THE UNITED STATES,

October Term, A. D. 1886.

THE CITY OF EAST ST. LOUIS,
Plaintiff in Error,

—vs.—

THE UNITED STATES *ex rel.* H. AMY & CO.,
Defendants in Error.

STATEMENT, BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

CHARLES WAIT THOMAS,
Attorney for Plaintiff in Error

IN THE SUPREME COURT OF THE UNITED STATES,

October Term, A. D. 1886.

THE CITY OF EAST ST. LOUIS, Plaintiff in Error,
—vs.—
THE UNITED STATES *ex rel.* H. AMY & CO., Defendants in Error.

No. 1151.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

STATEMENT OF THE CASE.

The relators instituted a mandamus proceeding to the January term, 1886, of the Circuit Court for the Southern District of Illinois, to compel the City of East St. Louis in that State, to pay a judgment in their favor for $36,495.28, rendered against the City in that Court, on the 22d day of August, 1885.

The judgment was rendered upon bonds and coupons of the City, issued since the adoption of the present constitution of Illinois, which went into force August 8th, 1870.

The City Charter, which, by its terms became a public law on the 26th day of March, 1869, is to be found in the Private Laws of Illinois of 1869, Vol. I, page 885 *et seq.*

Section 1, Article 3 of that charter is as follows:

"The City Council shall have power to levy and collect an annual tax, not exceeding one per centum per annum, upon all property, real and personal, within the jurisdiction of the city, upon the assessed value thereof, in such manner as may be prescribed by ordinance, not inconsistent with the constitution of this State; and the city council may adopt, as near as may be, the mode and manner prescribed by general law for

the assessment and collection of the state and county taxes * * *."

Section 4 of Article 3 of the charter is as follows:

"The city council shall have power to appropriate money and provide for the payment of the debt and expenses of the city; to borrow on the credit of the city a sum of money not exceeding one hundred thousand dollars; to issue bonds, scrip or certificates of indebtedness therefor in such amounts, and bearing such interest, and payable at such times and places, and in such manner as the city council may deem will make such such bonds, scrip or certificates most valuable or saleable, and best for the interests of the city; but no bond, scrip or certificate shall exceed in amount one thousand dollars, nor bear a greater interest than ten per cent. per annum * * * *."

Section 22 of Article 7 of the charter is as follows:

"A registry shall be kept of all the bonds, scrip or certificates of indebtedness issued, showing a full exhibit of all the material facts in relation thereto; and the city council shall levy and collect a tax, not exceeding three mills on the dollar, upon each annual assessment made for general purposes for the purpose of paying the interest on such bonds, scrip or certificates of indebtedness, and to provide a sinking fund to liquidate the same."

These are all the provisions of the charter bearing upon the subject of issuing bonds and providing for their payment.

Before the bonds upon which the above mentioned judgment was recovered, were issued, the present constitution of Illinois was adopted.

Section 12 of Article IX of that instrument is as follows:

"No county, city, township, school district or other municipal corporation shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes, previous to the incurring of such indebtedness. Any county, city, school district, or other municipal corporation, incurring any indebtedness as aforesaid, shall before, or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such a debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same * * *."

Revised Stat. of Illinois, p. 69.

The relator's petition as finally amended took two grounds, namely:

I. That the city council had refused to exercise the power conferred upon it by the charter to levy a three mill tax to pay its bonded debt.

II. That the provision of the State constitution above quoted, in effect abrogated the three mill limit and made it the duty of the council to levy a tax in excess of that limit if necessary, in order to pay the relator's judgment.

The Circuit Court found in its judgment that the council had levied the three mill tax annually to apply upon its bonded debt and made no order in respect

to the same, but also found as a matter of law, that the clause of the charter limiting the tax to pay interest and principal of the city's bonded debt, to three mills annually, was abrogated by the constitution. The question was raised by a demurrer to a portion of the petition, by which, upon its being overruled by the court, the city abided. That portion of the judgment order which bears upon the point above stated is as follows:

> "But as to the demurrer to the other allegations of said amended petition, and especially as to the averments that said bonds and coupons in judgment were issued by said city under its said charter since the adoption of the constitution of Illinois of 1870 and were a creation of a debt by said city, and that the provisions of section 12, article 9 thereof made it the duty of said city when creating said debt to provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it fell due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same, and alleging that said city had provided for said debt in the passage of said city ordinances Nos. 286 and 300 authorizing a tax sufficient to pay said bonds and coupons now in said judgment when and as they should become due * * * the court overrules the same, etc."
>
> Printed Record, p. 10.

So the points presented for decision are:

1. Does Section 12 Article IX of the Constitution of Illinois adopted in 1870, abrogated that portion of Section 1 Article 3 of the Charter of East St. Louis passed in 1869, which limits taxation for the purpose of paying its bonded debt, to three mills on the dollar?

II. If it does, will mandamus lie to compel a levy *en masse* to pay the whole debt and interest when the constitution only required the council to provide for the collection of an *annual* tax to pay the interest as it falls due and the principal within twenty years?

III. Does mandamus lie in any event when the order of the Court, as in this case, shows that the duty to be performed, to wit: to provide for an annual tax, has already been done?

ASSIGNMENT OF ERRORS.

I. The Circuit Court erred in overruling the demurrer of defendant below to the amended petition.

II. The Circuit Court erred in awarding a mandamus compelling the City Council of East St. Louis to levy a tax in excess of three mills upon the dollar for the purpose of paying relator's judgment.

BRIEF OF THE ARGUMENT.

I.

Mandamus is never awarded unless there is a clear and specific legal right to be enforced against one burdened with a corresponding clear and specific legal duty.

Supervisors v. United States, 18 Wal., 71
Dillon Mun. Cor. sec. 665.

II.

If all that is claimed concerning the operation of Section 12 Article IX of the Illinois Constitution is true, it does not appear that relators have a clear legal right to have a single tax upon a single assessment to pay their whole judgment. The most that can be claimed

is that the council was required to levy an *annual* tax sufficient to pay the interest as it accrued and to provide a sinking fund wherewith to pay the bonds within twenty years. This was a periodical duty the time of the performance of which was an essential element of its character, and a failure to perform it as required, does not create another duty, to wit: one to levy a tax *en masse* to meet the deficiencies of twenty years. This latter is not the clear and specific legal duty which it is claimed the constitution imposes.

III.

But the constitutional provision to *provide for* the collection of a direct annual tax at the time a debt is created is not a command to levy a tax and *ex necessitate rei* can have no such construction. It cannot be held to be a then present levy for each of the succeeding twenty years, for this would *pro tanto* dislocate the whole revenue system of the State as created by the Constitution itself. Nor does it require an annual levy in each year as it arrives, because it is a present duty and not a future one that is imposed. It is consequently not a requirement to levy a tax, but refers to some other proceeding.

IV.

The order of the Court, however, discloses that the city council did "*provide for*" the payment of relators' bonds as required by the Constitution. If this is so there is no duty to perform.

V.

State Constitutions, whenever a question arises as to whether they limit or grant power, are universally construed to be limitations and not grants.

Cooley Con. Lim., p. 173.

This principle applied to the provision under consideration would interpret Section 12 of Article IX as meaning that no municipal corporation should in any event become indebted in excess of five per cent. of the assessed value of the property within its jurisdiction, nor should it create any debt whatever without at the same time providing for its payment. This interpretation is in consonance with reason and authority, for courts have uniformly held that a specific charter limitation placed upon taxation is not abrogated by any general enactment of the character claimed for this constitutional provision.

Weber v. Traubel, 95 Ill., 427;
State v. Mayor, 23 La. Ann., 358;
Supervisors v. United States, 18 Wal., 71.

It having held therefore that the three mill tax permitted by the charter of East St. Louis is an express limitation upon its taxing power for the purpose of paying its bonded debt,

Zebley v. East St. Louis, 110 U. S., 321;
Weber v. Traubel, 95 Ill., 427,

the relators took their bonds with full notice that a special fund was provided for their payment and they contracted to look to and be satisfied with that fund.

ARGUMENT.

May it please the Court:

The proposition that a mandamus is never awarded unless there is a clear and specific legal right to be enforced against one burdened with a corresponding clear and specific legal duty is too well settled to need the support of any authority. As was said by Mr.

Justice Strong in *Supervisors v. United States*, 18 Wal. 77, "The office of a writ of mandamus is not to create duties, but to compel the discharge of those already existing. A relator must always have a clear right to the performance of a duty resting on the defendant, before the writ can be invoked."

In view of this principle, suppose for the sake of the argument, that Section 12 Article IX of the constitution of Illinois was all that is claimed for it by defendants in error. Suppose that its true construction required the City Council of East St. Louis, when relators' debt was created, to provide for the collection of a direct annual tax to pay the interest from year to year and the principal within twenty years without any reference to the charter limitation of a three mill annual tax for that purpose. Go one step further and admit what is not claimed, to wit, that the words "provide for the collection of a direct annual tax" mean to make an actual levy, and yet it is submitted, the relators have not shown a clear and specific right to have a tax levied on a single assessment and at a single time to cover the deficiencies of twenty years. The duty to levy a direct annual tax is a duty arising periodically. The time of its performance, as can be seen from the scope and purpose of the provision under consideration, is a necessary element of the duty itself. The duty is not to levy a tax at any time, but annually, and it is a duty which arises annually and must be enforced as it arises and only to the extent that it arises. A failure to make twenty annual tax levies upon twenty assessments which might be paid with convenience or without special hardship to tax payers, as required by law, does not call into being a duty to make one levy on one

assessment for the whole amount. If the council was charged with the duty of making an annual tax levy, the relators should have demanded its performance when and as it was due and upon being refused should have applied for their remedy. It would therefore seem, even if all and more than is contended for respecting this constitutional provision is conceded, that the relators have no clear and specific right to a single levy to pay their judgement.

But it cannot be successfully contended that the constitutional requirement to *provide for* the collection of a direct annual tax to pay a debt at the time the debt is created, is a requirement to make any actual tax levy. A levy to be then made for each of the succeeding twenty years could not have been contemplated, for this could only be upon property existing within the jurisdiction at the time of the levy. Property coming in after the levy would be exempt and the principle of uniformity in the taxation would be violated. Other objections arising out of annual assessments and various necessary provisions of the Revenue Laws respecting the time and manner of making annual tax levies make it clear that the constitution did not contemplate that a tax should be levied for twenty succeeding years at the time of the creation of the indebtedness. It is equally as clear that it did not contemplate an annual levy from year to year, because it requires whatever is to be done, to be done before or at the time the indebtness is created. It therefore appears that an actual tax levy was not what the constitution referred to by the phrase "provide for the collection of a direct annual tax." It is reasonable to suppose that all that was intended by this provision was an appropriation, by

proper municipal enactment, of the corporate revenues as they were annually collected, to the payment of the created indebtedness. The only provision that could be made outside of an actual tax levy, would be the separation of the annual revenues of the city for all purposes into two portions, one to be used to pay the indebtedness and the other for general purposes, and this is probably the meaning of the clause under discussion.

But whatever may be its meaning, the order of the Court in this case finds that the plaintiff in error complied with its provisions, and then singularly enough directs the levy of a tax upon the theory that the constitutional provision requiring the city to provide for an annual tax has been disregarded. The order finds that the constitution made it "the duty of said city when creating said debt to provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it fell due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same," and that "said city had provided for said debt in the passage of said city ordinances Nos. 286 and 300 authorizing a tax sufficient to pay said bonds and coupons now in said judgment when and as they should become due." Here we find a construction placed by the Circuit Court upon this provision of the constitution. The manner in which the direct annual tax must be "provided for" is by an ordinance "authorizing" it to be levied. That is the duty prescribed by the constitution and that duty the order finds *to have been performed*. If that duty has been performed what remaining duty arising out of the constitutional requirement remains to be performed?

None whatever, for that is all the duty that is enjoined.

The relators stand in this attitude. They contend that although the City is by its charter limited to an annual three mill tax to pay its bonded debt, yet the constitution abrogated that limitation and required an unlimited levy for that purpose. To support this they cite the clause under consideration, and when asked for an interpretation thereof say, not that it authorizes an unlimited levy but that it compels the City to "authorize" such a levy, or in other words, to promise to make it. This duty, which is the only duty imposed by the constitution, has been performed. But while the promise to levy has been made as required by the constitution, the levies themselves have not been made. But the levies themselves are not required by the constitution. The City must look elsewhere for its power to make them, and upon looking, finds that its organic law places a limit upon the annual levies which its cannot pass. The constitution then required it simply to "authorize" such annual levies as it had power to authorize—to make such promises as it had power to promise.

The clause of the constitution under consideration cannot be interpreted as a grant of power or a repeal of the limitation upon taxation contained in the charter of the plaintiff in error. State Constitutions, whenever a question arises as to whether they limit or grant power are universally construed to be limitations and not grants. This has become an axiom of American constitutional law. If this principle is applied, as it should be, to Section 12 Article IX of the Illinois constitution, its meaning seems reasonable. The section would then be construed as providing that no municipal corporation shall

become indebted in a sum greater than five per cent. of the assessed value of the property within its jurisdiction, nor shall any such corporation create any debt whatever without, at the same time, providing for a direct annual tax to pay it and the interest thereon. So construed the latter clause has no reference to the amount of the debt, nor does it purport to extend any taxing powers possessed by the corporation. It refers solely to acts already within the power of the municipality. This interpretation has the support of authority.

In *Weber v. Traubel*, 95 Ill., 427, the limitations placed by the charter of East St. Louis upon its council, were under consideration. In 1874 the General Assembly of Illinois passed a general act authorizing the establishment of Public Libraries in all the cities of the State, (Rev. Stat. Ill. Chap. 81) and empowered the municipal authorities to levy a library tax of not exceeding one mill on the dollar in cities of less than one hundred thousand inhabitants, of which East St. Louis is one. The Council levied this tax in addition to the one per cent. mentioned in its charter as the limit of its taxing power. It also contended that the three mills mentioned in Section 4, Article 3, of the charter could be levied in addition to the one per cent. to pay the bonded debt. The Supreme Court of Illinois, in the case cited examined both these contentions and held the contrary. The case is instructive as announcing with reference to this very charter, the principle here contended for, that where there is a special limit put upon the taxing power by the charter of a municipal corporation it is not to be enlarged by implication, or by general enactments which do not particularly have it under consideration.

It was also held in that case, as it was in *Zebley v. East St. Louis*, 110 U. S. 321, that the three mill tax was all that could be levied to pay the bonded debt of the city. Limitations upon taxing powers are for the protection of the people and Courts have never held them to be removed unless the intention of the law makers so to do, was clear. In the *State v. Mayor*, 23 La. Ann. 358, which is cited by the Supreme Court of Illinois in *Weber v. Traubel, supra.*, it appeared that by a law of Louisiana all cities and municipal corporations were prohibited from levying a tax in any year for any purpose in excess of two per centum on the assessed value of the property therein, and that the city in question had exceeded that limit, and the Court held that a mandamus would not lie to compel the city to levy an additional tax for school purposes, although a special act of the Legislature directed that a tax should be levied for that purpose. The principle was affirmed that even a special power to levy a tax for a specific purpose can only be exercised subject to any limit theretofore placed upon the general taxing power, and is not to be construed as an extension of that power. According to this doctrine the constitutional provision is no extension of the power to tax, but a direction concerning the use of powers already possessed.

It is respectfully submitted that the judgment of the Circuit Court ought to be reversed.

CHARLES W. THOMAS,
Atty. for Pltff. in Error.

120-600

Office Supreme Court U. S.
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CLERK.

IN THE

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, A. D. 1886.

No. 1151.

THE CITY OF EAST ST. LOUIS,
Plaintiff in Error.

vs.

THE UNITED STATES, EX REL. H. AMY & CO.,
Defendant in Error.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

Error to the Circuit Court of the United States—The Southern District of Illinois.

GEORGE A. SANDERS, OF SANDERS & HAYNES,
Of Counsel for Defendants in Error.

SPRINGFIELD, ILL.:
H. W. ROKKER, STATE PRINTER AND BINDER.
1887.

IN THE

SUPREME COURT

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THE CITY OF EAST ST. LOUIS,
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THE UNITED STATES, EX REL. H. AMY & CO.,
Defendant in Error.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

Error to the Circuit Court of the United States—The Southern District of Illinois.

STATEMENT OF THE CASE.

On the 22d day of August, 1885, defendant in error obtained a judgment against the plaintiff, on its bonds and coupons, for $36,495.28. All the bonds and coupons in the judgment

were issued by the City of East St. Louis, after the present Constitution of Illinois went into force and effect, August 8, 1870.

To collect this judgment, the relators commenced a mandamus proceeding, at the January term of the United States Circuit Court, 1886. (Record, p. 2). Default was taken, and judgment rendered March 10, 1886. (Record, p. 5). Default was set aside and answer filed, and on June 25, 1886, an amended petition was filed, to which demurrer was filed by the city as to a portion of the petition, and an answer as to some of its averments. (Record, p. 8). Replication was filed as to the answer, and joinder as to the demurrer to the amended petition.

The plaintiff in error claimed that it had exhausted its taxing powers under its charter, in a levy of one per cent. per annum annually upon all of its taxable property, three mills of which could be appropriated for paying interest on its bonded or scrip indebtedness, and to provide a sinking-fund to liquidate the same, and seven mills to be used for general expenses of the city government. That defendants in error had not demanded their pro rata of the three mills, which had been levied and collected to pay interest on its bonded and scrip indebetedness.

The court, upon a final hearing, made no order as to the three mills levy for interest on the city's bonded and scrip debt, but ordered a peremptory writ of mandamus, commanding the city council to levy a special tax upon all the taxable property of the city, subject to taxation for the year 1886, sufficient to pay relator's judgment of $36,495.28, and costs of the original suit, and the mandamus proceedings.

The decision of the court is based on the section of our State Constitution in force when all these bonds and coupons in this judgment were issued by the city, and the ordinances of the city Nos. 286 and 300, under which they were issued.

The language of Section 12, Article 9, of the Constitution, is as follows:

"No county, city, township, school district, or other municipal corporation, shall be allowed to become indebted in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate, exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes, previous to the incurring of such indebtedness. Any county, city, school district, or other municipal corporation, incurring any indebtedness as aforesaid, *shall, before*, or *at the time of doing so*, provide for the collection of a direct annual tax, sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same." * * *

The defendants in error, under the above section of the Constitution, and the ordinances under which the bonds and coupons were issued, claimed that the city council must levy a sufficient tax to pay the judgment standing against them, and costs therein. The court gave judgment for the defendants in error, and ordered a peremptory writ of mandamus to issue. From which judgment the plaintiff in error appeals to this court.

COPY OF THE LAWS AND ORDINANCES RELATING TO THE CASE.

Article 3 of the Charter of the City of East St. Louis.

"SECTION 1. The city council shall have power to levy and collect an annual tax, not exceeding one per centum per annum, upon all property, real or personal, within the jurisdiction of the city, upon the assessed value thereof, in such manner as may be perscribed by ordinance, not inconsistent with the Constitution of this State; and the city council may adopt, as near as may be, the mode and manner prescribed

by general law for the assessment and collection of the State and county taxes; and the assessor and collector of said city shall have the same power as the assessor and collector, under the general law of this State."

Section 4, of Article 3, of the City Charter, is as follows:

The city council shall have power to appropriate money and provide for the payment of the debt and expenses of the city; to borrow on the credit of the city a sum of money not exceeding one hundred thousand dollars ($100,000); to issue bonds, scrip, or certificates of indebtedness therefor, in such amounts, and bearing such interest, and payable at such times and places, and in such manner as the city council may deem will make such bonds, scrip, or certificates most valuable and saleable, and best for the interests of the city; but no bond, scrip, or certificate shall exceed in amount one thousand dollars ($1,000), nor bear a greater interest than ten per cent. per annum. With the moneys so borrowed the city council shall first liquidate and discharge all the legal indebtedness of the said city, and the balance, if any, of the amount so borrowed, shall be equitably expended by the city council in general improvements, that shall be for the general benefit of the city." * * *

Section 22, of the same charter, is as follows, to-wit:

"A registry shall be kept of all bonds, scrip, or certificates of indebtedness issued, showing a full exhibit of all material facts in relation thereto; and the city council shall levy and collect a tax, not exceeding three mills on the dollar, upon each annual assessment made for general purposes, for the purpose of paying the interest on such bonds, scrip, or certificates of indebtedness, and to provide a sinking-fund to liquidate the same."

Full Charter of City of East St. Louis, in force March 26, 1869—Private Laws of Illinois, Vol. 1, 1869, pp. 585–912.

Section 12, of Article 9, of the Constitution of 1870, of the State of Illinois, in force August 8, 1870, and when the bonds and coupons in the judgment sought to be collected by this mandamus proceeding, were issued, is as follows, to-wit:

"No county, city, township, school district, or other municipal corporation, shall be allowed to become indebted in any manner or for any purpose, to an amount, including

existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes, previous to the incurring of such indebtedness. Any county, city, school district, or other municipal corporation, incurring any indebtedness aforesaid, shall, before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same. This section shall not be construed to prevent any county, city, township, school district, or other municipal corporation, from issuing their bonds in compliance with any vote of the people which may have been had prior to the adoption of this constitution in pursuance of any law providing therefor."

Hurd's Revised Statutes of Illinois, 1885, p. 69.

Article 2, section 19, of Bill of Rights—Constitution of 1870—is as follows, to-wit:

"Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; he ought to obtain, by law, right and justice freely, and without being obliged to purchase it, completely, and without denial, promptly and without delay."

Hurd's Revised Statutes of Illinois, 1885, p. 55.

On the bonds issued under ordinance of the city, *No. 300*, known as *renewal bonds*, and numbered consecutively from 51 to 130, both inclusive—dated July 1, 1876, and due in ten years—July 1, 1886; coupons from which form part of the judgment on which these mandamus proceedings are based, Article 9, section 12, of the Constitution of 1870, is printed on the back of each bond, (quoted above) and also the following statement, and the ordinance *No. 300*, are printed on each bond as follows, to-wit:

"The within bond was issued within the foregoing Constitutional restriction, under the ordinance of the city of East St. Louis, duly published by authority of the City Council, May 27, 1876, in the East St. Louis *Gazette*, the official journal of the city, viz.:

(No. 300.)

An ordinance authorizing the issue and sale of eighty bonds of the city of the denomination of five hundred dollars each, to be known as "Renewal Bonds," appropriating the proceeds thereof for the redemption of bonded indebtedness of the city, due during the current fiscal year, and providing for the payment of the interest and principal of such bonds.

Be it ordained by the City Council of the city of East St. Louis:

Section 1. That to raise money wherewith to pay bonded indebtedness of the city, due during the current fiscal year, not otherwise provided for, there be issued, in the usual manner, by the Mayor and Clerk of the city, attested by the city seal, and countersigned by the Treasurer and Auditor, eighty coupon bonds of the city, of the denomination of five hundred dollars each, to be known as "Renewal bonds," numbered consecutively from 51 to 130, both inclusive, to be dated July 1, 1876, having ten years to run, payable with interest at the rate of ten per cent. per annum, on coupons, payable semi-annually on the first day of January and July, at the National Park Bank of New York City, N. Y.

Section 2. That for the purpose of paying the interest on said bonds, as it falls due, and also to pay and discharge the principal thereof at maturity, there be annually collected with, and as a part of, the direct tax authorized annually to be collected from the taxable property within the jurisdiction of the city, the following sums of money, to wit: as a part of, and with the tax levy for 1876, and each succeeding year to 1884, inclusive, the sum of four thousand dollars to pay interest due in 1877, and each succeeding year to 1884, inclusive, and as a part of and with the tax levy of 1885, the sum of forty-four thousand dollars to pay interest and principal maturing in 1886.

Section 3. That the Mayor and Treasurer are hereby authorized to negotiate the sale of said bonds in the manner set forth in section 4, of article III. of the charter of the city, notifying bidders for said bonds that no bid below par will be considered.

Section 4. That the proceeds of the sale of said bonds shall be kept separate and apart from all other funds of the city and shall be applied for the purpose of paying bonded indebtedness of the city, and for no other purpose.

Section 5. This ordinance to be in force and effect from and after its passage and promulgation.

Passed May 26, 1876. WILLIAM O'NEILL, *City Clerk.*

[SEAL.] S. S. HAKE, *Mayor.*"

Approved May 26, 1876.

BRIEF.

Mandamus **is the only remedy to compel a municipal corporation to levy a tax to pay a judgment against it.**

Louisiana ex rel. Nelson v. *Police Jury et al.*, 111 U. S. 716.

United States v. *New Orleans*, 98 U. S. 381.

United States v. *Fort Scott*, 99 U. S. 152,

Knox County v. *Aspinwall*, 24 How. 376.

Hoffman v. *City of Quincy*, 4 Wall. 535.

County of Cass v. *Johnson*, 95 U. S. 360.

Benbow v. *Iowa City*, 7 Wall. 175.

Wood on *mandamus*, p.p. 23, 25.

10 Wend. 363.

The city authorities, in the issue of the bonds, whose coupons make a part of this judgment, printed on them section 12, of article 9, of the Constitution of Illinois of 1870, then in force, and also that the issue was within the constitutional restrictions, cited on each bond, and the ordinance of the city No. 300, under which they were issued. These recitals of the section of the constitution and the ordinance on the bonds thus became a part of the contract between the city and the holders of the coupons and bonds that entered into the judgment, and the plaintiff in error is bound by them in this proceeding.

Murray v. *Charleston*, 96 U. S. 445.

Louisiana ex rel. Nelson v. *Police Jury et al.*, 111 U. S. 716.

Hurd's Rev. Statute of Ills., p. 68, sec. 10, Art. 9 Constitution of 1870.

Law et al. v. *The People*, 87 Ills. 385.

Pendleton v. *Army*, 13 Wall. 305.

Van Hostrop v. *Madison*, 1 Wall. 384.

The power to issue the bonds in controversy and make provisions for the payment of the principal and interest thereon is found in sec. 12 of Art. 9 of the Constitution of 1870, and ordinance No. 300, cited in and printed on the bonds, and the defendants in error cannot be limited in the collection of their judgment obtained on coupons from such bonds to any limiting sections of the city charter.

United States v. *Baltimore and Ohio R. R. Co.*, 17 Wall. 322.

Tennessee v. *Sneed*, 96 U. S. 69.

Police Jury v. *Shreveport*, 5 La. An. 661.

Dillon munic. corps., p. 75 and citations.

People v. *Morris*, 13 Wend. 325.

Louisiana ex rel. Nelson v. *Police Jury*, 111 U. S. 716.

U. S. ex rel. Foote v. *Co. of Howard*, (U. S. Cir. Ct., E. Div. Mo.) Federal Rep't, Vol. 2, p. 1.

The Constitution of 1870 abrogated and annulled all limitations of the taxing power of the city charter, inconsistent with its terms.

Angell & Ames on corps. (11 ed.) p.p. 835, 836.

United States v. *Balt. & Ohio R. R. Co.*, 17 Wall. 322.

Cooley's Const. Linn, 235.

Railroad Co. v. *McClure*, 10 Wall. 511

People v. *Morris*. 13 Wend. 325.

State Bank of Ohio v. *Knoop*, 16 How. 369.

Dillon on Munic. Corps., 75.

Sect. 10, Art. 9, Constitution of 1870, Hurd's Rev. Stat. Ills., 1885, p. 68.

Hampshire v. *Franklin*, 16 Mass. 76.

Marietta v. *Fearing*, 4 Ohio 427.

Richwood v. *Lawrence*, 12 Ills. 1.

Berlin v. *Gorham*, 34 N. H. 266, 275.

The authority possessed by a municipal corporation to create a debt and issue bonds therefor includes the power to levy a tax for their payment.

Pierce on Railroads, 98.

Seybert v. *Pittsburg*, 1 Wall. 272.

United States v. *New Orleans*, 98 U. S. 381.

Hancock v. *Chicot Co.*, 32 A. R. 575, 583.

Lowell v. *Boston*, 111 Mass. 460.

Hasbrouck v. *Milwaukee*, 25 Wis. 122.

Parsons v. *The City of Charleston*, Hughes 282.

Loan Association v. *Topeka*, 20 Wall. 655–660.

Hyde Park v. *Ingalls et al.*, 87 Ill. 13.

Town of Concord v. *Portsmouth Savings Bank*, 92 U. S. 629.

Commonwealth v. *Allegheny Co.*, 37 Pa. 277.

ARGUMENT.

The first objection raised by the plaintiff in error is, that "mandamus is never awarded unless there is a clear and specific legal right to be enforced against one burdened with a corresponding clear and specific legal duty." In this case the defendants in error have a judgment against the city of East St. Louis. All questions as to the bonds and coupons, or their issue, has been settled by the Circuit Court in the judgment entered against the city. The city refuses to pay the same, or make provisions to pay it, and the proper and only remedy to compel the collection of the judgment, is by mandamus. If the defendants have any remedy, or power to compel the necessary tax levy to pay their judgment it is by mandamus. If the city had the power to contract the debt, which is not denied, then it has the power to tax

to the extent necessary for its payment, unless there be legal limitations, that prohibit the exercise of the taxing power. This question, as to whether there be any such legal limitations, to the exercise of the taxing power sufficient to meet and pay the claims of the defendants in error, must be determined, we think, by the laws in force on this subject when the contract was made, between the city in issuing the bonds and coupons which enter into the judgment, and will be discussed further on.

The plaintiff claims that the city has levied all the tax it can by law levy, for the payment of the defendants' judgment under the claimed limitations of its charter, and that, therefore, the city having done its duty, a mandamus will not lie to compel further taxation to pay defendants' judgment.

We claim that there are no limitations in the city charter of the plaintiff that can defeat the levy of sufficient tax to pay in full and at one levy the judgment and costs of defendants in error. The admission of the plaintiff that the city has levied taxes up to their claimed charter limitation, to be applied upon claims of defendants, is a confession that the city has no other means of payment but by taxation, and there is no other remedy known to the law to compel taxation to pay a judgment against a municipal corporation but mandames.

Wood on Mandamus, p. 23, 25.

10 Wend. 363.

United States v. *New Orleans*, 98 U. S. 381.

United States v. *Fort Scott*, 99 U. S. 152.

This court say, *United States* v. *New Orleans*, 98 U. S. 379:

"Having the power to levy a tax for the payment of the judgments of the relator, it was the duty of the city, through its authorities, to exercise the power. The payment was not a matter

resting in its pleasure, but a duty which it owed to the creditor. Having neglected this duty, the case was one in which a mandamus should have been issued to enforce its performance."

Knox Co. v. *Aspinwall*, 24 How. 376.

Hoffman v. *City of Quincy*, 4 Wall. 535.

Benbow v. *Iowa City*, 7 Wall. 313.

The Supervisors v. *Rogers*, 7 Wall. 175.

The Supervisors v. *Durant*, 9 Wall. 415.

County of Cass v. *Johnston*, 95 U. S. 360.

The laws in force when the contract was made, by the issuing of the bonds and coupons which make up the judgment of the defendants in error must control as to the amount of the tax to be levied for its payment in a controversy of this nature.

There is no dispute as to the authority of the city to issue the bonds and coupons that make up the judgment. They were issued under the ordinances of the city, and recite on their face the number of the ordinance under which they were issued, and print on the back of each bond the terms and conditions of payment of interest and principal, as they appear in the ordinances in full. They also print on the back of each bond, Sec. 12, of Art. 9 of the Constitution, and state that the bonds are within the restrictions of that Constitution, which was in force when the bonds were issued. *These recitals on the bonds are a part of the contract*, and the city cannot now evade their terms. It states in these recitals under what ordinance they are issued, prints on the bonds all the terms and conditions of the payment of interest, and principal, *when due*. It also prints the Sec. 12 of Art. 9 of the Constitution, and says to the purchaser that they are issued "*within the foregoing constitutional restrictions.*" The city has utterly failed to perform its terms of the contract as expressed in the ordinances recited, and the section of the Constitution under

the restrictions of which it voluntarily placed itself. The only restrictions or limitations, therefore, that can effect or become applicable in the taxation for the payment of the judgment arising from these bonds and coupons, are such as are found recited in the ordinances, and those of the 12th Sec. of Art. 9 of the Constitution, and placed upon the bonds as a part of the contract, and as an inducement to the purchaser to take the bonds. There is no better settled principle of law than that where there is authority granted a city to execute evidences of indebtedness in the form of bonds, the courts will enforce their payment according to the terms of the contract, under the laws, as they existed when it was made.

Sec. 12 of Art. 9 of the Constitution, which was in force when the bonds were issued and by law a part of the contract, was printed on the bonds, and thus *specially* made a part of the contract. The city thus contracts that "it shall before, or at the time of doing so (incurring the debt), provide for the collection of a direct annual tax, sufficient to pay the interest on such debt, as it falls due, and also to pay and discharge the principal thereof, within twenty years from the time of contracting the same." There is no other restriction or limitation in that section that is claimed as at all affecting the questions involved in this case.

The language of the ordinance cited on the bonds "*in pursuance*" of which they were issued, as to the times of payment of interest and principal, is as follows, to-wit:

"SEC. 2. That for the purpose of paying the interest on said bonds, as it falls due, and also to pay and discharge the principal thereof at maturity, there be annually collected from the taxable property within the jurisdiction of the city, the following sums of money, to wit: As a part of and with the tax levy for 1876, and each succeeding year to 1884, inclusive, the sum of

four thousand dollars, to pay the interest due in 1877, and succeeding years to 1884, inclusive, and as a part of and with the tax levy of 1885, the sum of forty-four thousand dollars, to pay interest and principal maturing in 1886." (*See Laws and Ordinances relied on, supra.*

It will be observed that in this ordinance the city promised to not only pay the interest when due, but also to levy enough tax in the year of 1885, to pay the principal and interest maturing in 1886. This the city has not done and now refuses to do. There is nothing said in this contract about any limitations whatever, on the taxing power of three-tenths of one per cent. per annum, as claimed in their charter; but a square promise to pay by taxation the whole interest and principal, according to the tenor and effect of the bonds and coupons so issued. The fact that the defendants in error have been compelled to put their bonds and coupons into judgment, does not lessen their power to collect under the contract then made, nor change the terms of it, from a tax levy promised for the full amount of principal and interest when due, to a tax levy of three-tenths of one per cent. per annum, which would not pay the interest, to say nothing of the principal. Moreover, in the recitals on the bonds, the city recite section 12 of article 19, of the Constitution, and say that "*The within bond was issued within the foregoing constitutional restriction.*" The first part of that section refers to the restriction of all indebtedness of municipalities, under the Constitution of 1870, to an aggregate sum not exceeding five per centum on the value of the taxable property therein, as ascertained by the last assessment for State and county taxes previous to the incurring of such indebtedness. There is no controversy as to this restriction, and if there was, they have recited over the signatures of the then City Clerk, William O'Neill, and the then Mayor, S. S. Hake, under the seal of the city, that the bonds

were within the constitutional limitations. Under a long line of decisions of this Court, the city is bound by the recitals on the bonds, made by its duly authorized officials, and is now estopped from denying them.

The other restriction, in section 12 article 9 of the Constitution, is as follows: "Any county, city, school district, or other municipal corporation, incurring any indebtedness as aforesaid, shall, before, or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same."

It will be observed that the city not only cite on the bonds this section of the Constitution, but they attempt to comply with its terms. They pass an ordinance, whose terms meet the demands of this section of the Constitution. This ordinance (No. 300) was passed and approved May 26, 1876, and these bonds are dated July 1, 1876. There can be no possible doubt but that the city intended to place itself under these constitutional provisions as to terms of payment of interest and principal, *when they were issued*, and that the ordinance No. 300 was drawn so as to meet and come under all of their requirements.

If there is any conflict of the taxing powers of the city under section 12 article 9, of the Constitution and ordinance No. 300, and section 22 of article 7, of the city charter, as to the amount of tax the city can levy, the constitutional limitations and ordinance No. 300 must prevail as to their terms of taxation, because they are recited on the bonds, and thus become a part of the contract. And because the city has, by its ordinance and terms of its bonds, construed the contract as coming under section 12, of article 9, of the Constitution.

Counsel for plaintiff in error argues that the city has fulfilled its obligations under the constitutional requirements, Sec. 12, by *providing an ordinance*, in terms, for the payment of the interest and principal of the bonds when due. The Constitution and the contract requires that the city shall not only *provide* for the payment of interest and principal when due, but also *carry into effect the provisions* of the ordinance and constitutional requirements; levy the required tax, collect the same, and pay the claims of the defendants. Nothing short of this will meet the terms of the contract, or satisfy the requirements of Sec. 12, Art. 9, of the Constitution.

Counsel for the plaintiff argues that the language of Sec. 12, Art. 9, of the Constitution cannot mean to give authority for a levy *en masse*, to pay the principal and matured interest of these bonds when due. Why not? What other interpretation can possibly be given it? The city authorities certainly so understood and construed it when they drew up the ordinance, and when they issued the bonds. For the ordinance, in terms, authorized, besides the amount of annual interest to be levied, a levy of a tax sufficient to produce $44,000, the amount of principal and interest that then would have been due in 1886, if the city had kept its contract, and paid its interest annually, as it promised to do.

Counsel for plaintiff seems to claim that the city, under the constitutional limitation, can at the expiration of 20 years from their date, pay off their bonds, no matter what the terms of payment of the bonds may be, and still be within the provisions of that Section. This would compel the holder of the bonds given for 10 years to wait 10 more years, and that, too, without provision for their interest, before he could hope to collect his principal, which is an absurdity.

The plaintiff in error, in the issue of the bonds, claims and admits by their ordinance, powers to levy and collect sufficient tax to pay interest and principal on the bonds when due, and yet, when time of payment comes, they seek to deny the powers invoked when they issued and sold their bonded promises to pay.

This court say, in *Murray* v. *Charleston*, 96 U. S. 445:

"It is against the rules, both of law and of reason, to admit by implication in the construction of a contract a principle which goes in destruction of it. The truth is, States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons. Hence, instead of their being in the undertaking of a State or city to pay, a reservation of sovereign right to withhold payment, the contract should be regarded as an assurance that such a right will not be exercised. A promise to pay, with a reserved right to deny, or change the effect of the promise, is an absurdity."

Again in the same case, *supra*, p. 448, speaking of the obligations of contracts, the Court say: "*Complete effect* must *be given to it in all its spirit*. The inviolability of contracts and the duty of performing them, as made, are foundations of all well-ordered society, and to prevent the removal or disturbance of these foundations was one of the great objects for which the constitution was framed."

Again. "A city, when it borrows money and promises to repay it with interest, cannot, by its own ordinances, under the guise of taxation, relieve itself from performing to the letter all that it has expressly promised its creditors."

Again, section 22, article 7, of the charter of the city reads as follows: * * * "And the City Council shall levy and collect a tax, not exceeding three mills on the dollar, upon each annual assessment made for the interest on such bonds, scrip or certificate of indebtedness, *and to provide a sinking fund to liquidate the same*."

We submit that the fair interpretation of the obvious meaning of the last clause of the above section is, that *in addition* to the three mills tax for interest, the city is authorized *to provide for a sinking fund to liquidate the principal*, or the bonds, scrip or certificate of indebtedness. The language indicates that the three

mill tax is for the payment of *interest on the debt*, and that *other provisions* were to be made, *outside of and in addition to* this three mill fund, for the purposes of raising a sinking fund to liquidate, *not the interest*, for the three mill tax provides for that, but *the principal debt*, when it should become due.

DOES SECTION 12 OF ART. 9 OF THE CONSTITUTION OF 1870 NULLIFY OR ABROGATE THE TAX LIMITATIONS OF SECTION 22, OF ARTICLE 7, OF THE CHARTER OF THE CITY OF EAST ST. LOUIS?

We think there can be no doubt that the Constitution of 1870 abrogated and annulled *all there was in the city charter inconsistent with the provisions of the requirements of the Constitution.* The Constitution is the supreme law of the State. Every law not in harmony with its express or clearly-implied provisions or saved within its exceptions, was at once annulled upon its adoption.

Cooley's Const. Lim., 4th ed. 228.

All legislative acts, city charters and authority for corporate action, *must be in harmony with the provisions of the Constitution of the State and the United States.* Municipal corporations have no express powers except what are granted by the Legislative act creating them, and are always subject to the higher powers of the Constitution.

Cooley's Const. Lim., 235.

The State Constitution is a "law" State cannot by it impair obligations of contracts.

Railroad Co. v. *McClure*, 10 Wall. 571.

These are axiomatic principles incident to our form of government and need only to be stated.

We think this Court has fully settled this question in *United States* v. *the Baltimore & Ohio Railroad Co.*, 17 Wall. 322.

The Court say: "A municipal corporation like the city of Baltimore is a representative not only of the State, but is a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the State. The State may withdraw these local powers of government at pleasure, and may, through its legislature, or other appointed channels, govern the local territory as it governs the State at large. It may enlarge or contract its powers or destroy its existence."

Here the Court holds all the defendants ask for: that the State, through its Constitution of 1870, abrogated and annulled the charter limitations of the city of East St. Louis, as to its three-tenths of one per cent. tax to pay its bonded debt and interest, and enlarged its powers of taxation to the raising by taxation of a sufficient sum to pay the interest and principal when due on its debt contracted by authority of law, and within the constitutional limitations. In support of the same see

Tennessee v. *Sneed*, 96 U. S. 69.

Police Jury v. *Shreveport*, 5 La. An. 661.

State Bank v. *Navigation Co.*, 2 La. 294.

Reynolds v. *Baldwin*, 1 Ib. 162.

Dillon on Munic. Corps., p. 75, says: "With the exception of certain constitutional limitations presently to be noticed, the power of the legislature over such corporations is supreme and transcendent; it may erect, change, divide, and even abolish them at pleasure, as it deems the public good to require. "It is an unsound and even absurd proposition, that political power conferred by the legislature can become a vested right, as against the government, in any individual or body of men."

People v. *Morris*, 13 Wend. 325.

U. S. ex rel Foote v. *Co. of Howard*, (U. S. Cir. Ct., E. Div., Mo.) Federal Reporter, Vol. 2, p. 1.

"A municipal corporation, in which is vested some portion of the administration of the government, may be changed at the will of the Legislature."

State Bank of Ohio v. *Knoop*, 16 How. 369.

As to contracts entered into *before* the adoption of the Constitution of 1870, they would have to be interpreted under the Constitution of 1848 and the laws in force when they were executed. But it is admitted that all the bonds and coupons that entered into the judgment, the defendants in error are seeking by this suit to collect, were issued *since the adoption* of the Constitution of 1870, and must be governed by its provisions in reference to the rate of tax which may be levied for their payment. It seems to us that there can be no possible escape from this conclusion, nor would there be any justice or equity in any other. The language of the section is as clear and explicit as can be. "That any county, city, school district, or other municipal corporation, incurring any indebtedness as aforesaid, *shall, before or at the time of doing so, provide* for the collection of a direct annual tax sufficient to pay the interest on such a debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same."

The meaning of this is very obvious. That after its adoption there should be no municipal debts contracted without provision for their payment by sufficient taxation at *the time of, or before, the debt was incurred*. The terms of the section are full and explicit. The tax was to be a direct tax, annually levied, sufficient to pay interest when due, and the principal *within* twenty years. There can be no question about the tax for interest that is to be levied and paid when it falls due, and there is no limit as to the rate. It is to be *sufficient* for the full payment of the interest, when due. That is according to the terms of the contract in the

bonds and coupons issued. Nor would there seem to be any difficulty as to the meaning of the section in reference to payment of the principal. In the preceding part of Sec. 12 (*see Laws relied on supra*) there is a Constitutional limitation as to *the amount* of municipal indebtedness that may be incurred to five per cent. of the assessed value of property for State and county purposes, of the year preceding the incurring of the debt. In the latter part of Section 12, *supra*, the Constitution limits the time, *which in any event, the debt shall run*. It means to say, and does say, we think, in plain terms, that municipalities may incur debts for amounts of less than five per cent. of their assessed value, for *any length of time they may contract for*, within twenty years, but that they can not contract any debt that shall run unpaid for a longer period than twenty years. The rate of taxation in the Constitution is necessarily left to the city to determine, as that depends upon the amount of debt they at any time contract, but clearly says it *must be sufficient* to pay annually the interest and principal when due. If the *rate* of taxation is left to the city, (limited only to a sufficient amount to pay interest annually and principal when due,) so also is the *time* when the debt is to be paid left to the terms of the contract made by the city, and in no event can exceed twenty years.

The view of plaintiff's counsel, that in any event, no matter what the terms of the bonds or contract were as to time of payment, if they discharged the debt within twenty years they were within the meaning of the constitutional limitation, is an absurdity, and that by simply passing an ordinance *to provide* for the payment of interest and principal of the debt, the city had met the requirements of the Constitution. The letter and spirit of the Constitution require not only that the city shall *provide* for payment of interest and principal when due, according to the terms

of the contract, but also *see that the provisions are fully carried into effect, sufficient money levied, collected and paid over to meet the amount of interest and principal of their debt.* Again, the city itself fully accepts our view, that the constitutional provisions and limitations in section 12, abrogate and annul any provisions of its charter in conflict with section 12, of article 9, of the Constitution, *by accepting and acting under its charter.*

Section 1, of article 3, of the city charter (see laws relied on) states what may be done as to levy and collection of taxes *not inconsistent with the Constitution of the State.* The terms of the contract fix the time of payment of principal and interest, and the constitutional section requires a sufficient amount to be levied and collected to pay both, and that no contract shall be made for a longer period than twenty years. Unquestionably the Constitution meant to authorize municipalities to create a debt, if desirable, to within five per cent. of their assessed value at the time, and to authorize taxation sufficient to pay such a debt, principal and interest, when due.

On *constitutional limitations* in *Law et al.* v. *The People*, 87 Ill., the Court say: "Limitations imposed by the Constitution on the power of municipal corporations to contract debts should be construed with reference to existing facts, and with a view to the practical working of that instrument, and such a literal construction as would defeat the object to be attained should not be adopted."

Again: "Courts are not justified in giving a strained construction or astute interpretation to a constitutional provision to avoid the intention of the framers of the instrument, or of a statute passed under it to carry out its mandate, in order to relieve against individual or local hardships. Their duty is to enforce them according to their plain and obvious meaning."

Section 10, article 9, of the Constitution of 1870, *Hurd's Revised Statute of Illinois*, p. 68, says: "That the General Assembly shall not impose taxes upon municipal corporations, or the inhabitants or property thereof for corporate purpose, but shall require

that all the taxable property within the limits of municipal corporations shall be taxed for the payment of debts contracted under authority of law."

This section is a part of the same article of the Constitution as section 12, and clearly indicates that its meaning is, that all taxable property within the corporation shall be taxed to the extent necessary to pay its debts contracted under authority of law, in accordance with the terms of the contract.

Again—Unless the city, and its authorized officials, intended to issue these bonds under the provisions of the Constitution of 1870, their issue and sale was a gross fraud on the innocent purchaser, for there was not sufficient revenue arising from the three-tenths of one per cent. tax in their charter, the limitation they now claim, to pay the interest and principal on their then existing debt. We know of no principle of law, or judicial decision, that would uphold them in such a practice. They cite the ordinance and section of the Constitution which gave full power to issue and tax to pay them, on their bonds to make them saleable, and we insist they must be held to their contract, and this court has so held in 111 U. S. Louisiana ex rel. *Nelson* v. *Police Jury et al.*, 716, in which the court say:

"A judgment creditor of a municipal corporation entitled by his original contract to be paid out of specific tax levies, which agreement the corporation failed to comply with, is entitled, in mandamus proceedings, to a writ ordering the levy and collection of a sufficient tax to pay his judgment according to the assessment roll of the year in which the levy is made."

Municipal corporations are liable upon their *authorized* contracts, made b ythe proper officers or agents, in the same manner and to the same extent as private corporations or natural persons.

Wait's Actions and Defenses, 4, 632.

"Where such a corporation, in dealing with individuals, *assumes powers* upon which the validity of its acts depends, and subsequently it turns out that it did not possess the specific powers relied on, it is not thereby excured from performance of its obligations, *if they can be performed through the agency of other powers which it does possess.*"

Maher v. *City of Chicago*, 38 Ill. 266.

City of Chicago v. *The People*, 48 Ill. 416.

"Where a series of contracts has been openly made by the officers of a municipal corporation, within the knowledge of the corporators, who have acquiesced in and derived benefit from them, the contracts are binding on the corporation, although not expressly authorized in its charter."

Allegheny City v. *McCurken*, 14 Penn. St. 81.

Wait's Actions and Defences, 4, 633.

The authority possessed by law, by a municipal corporation, to create a debt and issue bonds therefor, includes the power to levy a tax for their payment.

Under this head we quote from *Lowell* v. *Boston*, 111 Mass. 460, where the court says:

"The right to incur the obligation (issuing of bonds by the city) implies the right to raise money by taxation for payment of the bonds, or, what is equivalent, the right to levy a tax for the purpose for which the fund is to be raised by means of the bonds so authorized."

In *United States* v. *New Orleans*, 98 U. S. 395, the court say:

"Indeed, it is always to be assumed, in the absence of clear restrictive provisions, that when the Legislature grants to a city the power to create a debt, it intends that the city shall pay it, and that the payment shall not be left to its caprice or pleasure. When, therefore, a power to contract a debt is conferred, it must be held that a corresponding power of providing for its payment is also conferred. The latter is implied in the former, and such implication cannot be overcome except by express words excluding it."

The same doctrine is announced in *Loan Association* v. *Topeka*, 20 Wall. 660.

Commonwealth v. *Commissioners of Allegheny*, 37 Pa. 277.
Hasbrouck v. *Milwaukee*, 25 Wis. 122.
Parsons v. *the City of Charleston*, Hughes, 282.

In making the citations under this head, we are well aware of the protection courts give to municipal corporations, where there are restrictive legislative acts, but we do not think there are any limitations in the case at bar that bring it under that line of decisions. The very best that can be claimed for the plaintiff's limitations of the taxing power in its charter (if there is any conflict between the chartered limitations claimed by the plaintiff and the positive requirements of the Constitution) is that it existed when the bonds were issued, unless abrogated and annulled by the higher power of the Constitution of 1870, also in force at the same time.

While the purchaser is bound to know that power exists for the issue of his bonds, yet in this case the city recite ample power for their issue, and being in the hands of a *bona fide* holder, as the judgment proves, he is entitled to have his contract construed and enforced in accordance with the recitals, in the collection of his judgment.

THE CASES CITED BY COUNSEL FOR PLAINTIFF IN ERROR CONSIDERED.

In the case of *East St. Louis* v. *Zebley*, 110 U. S. 321, it will be observed on an examination of the findings of the court (10th p. 323) that the facts in the case are not the same as those in the case at bar, and, therefore, a very different case is presented. Furthermore, the same court has passed upon both cases and with a different decision. In that case the court held that a specific sum of $10,000 should be levied and collected and paid annually out of the seven-tenths of one per cent. claimed to be the limit of taxation under the charter, for general purposes for the city expenses.

This court decided in that case "that it was not a judicial question for courts to decide what expenditures are proper and necessary for the municipal administration of a city."

The Circuit Court holds in the case at bar, that under the Constitutional provisions of 1870, under which the bonds in this suit were issued, that sufficient tax must be levied to pay the interest and principal when due, of bonds and coupons, that made up the judgment of the defendants. The cases are, therefore, entirely different, and that decision is not applicable to the case at bar.

The case of *Weber* v. *Traubel, et al.*, 95 Ill. 431, is also very different from the case at bar. In that case the question is as to whether, under a legislative act, the city was authorized to levy and collect an additional tax of not exceeding one mill on the dollar, for "Library Fund," above the one per cent. limitation in the City Charter. The State Supreme Court held that it could not be done. Here both grants were legislative acts — one in the City Charter and the other in the Library Fund Act — and of equal power and force. In the case at bar we invoke and come under a higher grant of power, — that of the Constitution, — which must prevail when there is any conflict between its requirements and those of mere legislative enactments. Nor does the question we raise in the case at bar appear to have been considered as to the effect of the Constitution, when adopted, in abrogating the limiting of taxation in a case where the interests of third and innocent parties were involved. The advocates of the "Library Fund" had no contract with the city whereby it agreed to levy sufficient tax to pay interest and principal when due, as had the defendants in the case at bar.

We therefore do not think that case at all applicable to the case at bar, as the questions decided are entirely different, and invoke and come under different principles of law.

In *Supervisors* v. *United States*, 18 Wall. 71, cited by counsel for plaintiff, we think different questions were presented and decided from those involved in the case at bar. We do not ask the court to confer independent or new powers to levy a sufficient tax to pay defendants judgments, as seems to have been asked in the last cited case, but only the enforcement of the terms of the contract, as recited on the bonds, under conditions granted by the Constitutional provisions then in force, when the contract was made.

In *Butz* v. *City of Muscatine*, 8 Wall. 575,—a case quite analogous to the case at bar,—this court say, that the act "which authorized the council to levy a tax not exceeding one per cent. on the assessed value, in any one year, of the property of the city, is a limitation touching the exercise of the power of taxation in the ordinary course of municipal action." It does not apply to a case where a judgment has been recovered against the city. When the judgment is recovered the duty arises, and it can be satisfied only by paying the debt, interests and costs in the manner prescribed. The court say further (p. 581,) "all the corporate property of the debtor is exempt by law from execution. The tax of one per cent. is all absorbed by the current expenses of the debtor. There is neither a surplus, nor a prospect of a surplus which can be applied upon the judgment. The resources of the debtor may be ample, but there is no means of coercion. The creditor is wholly dependent for payment upon the bounty and the option of the debtor. Until the debtor chooses to pay the creditor can get nothing. The usual relations of debtor and creditor are reversed, and the judgment, though solemnly rendered, is as barren of results as if it had no existence. Such are the effects which must necessarily follow from the theory, if

maintained, of the (plaintiff in error). Nothing less than the most cogent considerations could bring us to the conclusion that it was the intention of the law-making power of so enlightened a State to produce by its action such a condition of things in its jurisprudence."

THE POWER TO CREATE THE DEBT CARRIES WITH IT THE IMPLIED POWER TO PAY BY TAXATION IN MUNICIPAL CORPORATIONS.

There is a long line of cases supporting this proposition, and while, if our reasoning is correct, we have ample authority under the Constitution of 1870, for the collection by *mandamus* of defendant's judgment, yet these cases are cumulative in their support on principles of equity as well as law. We cite a few of these cases:

United States v. *New Orleans*, 98 U. S. 395.
Lowell v. *Boston*, 111 Mass. 460.
Hasbrouck v. *Milwaukee*. 25 Wis. 122.
Parsons v *The City of Charleston*, Hughes 282.
Commonwealth v. *the Com's of Allegheny Co.*, 37 Pa. 277
Loan Association v. *Topeka*, 20 Wall. 660.

If our position in this case be not tenable, then there is a great wrong without a remedy. The judgment becomes of no force, for, if the claimed limitations to the taxing power are to stand, in a case of this kind, there is left no power to enforce collection of the judgment legally obtained. In that event the following bill of rights is of no force:

"Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, prop-